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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 268.

SEABOARD AIR LINE RAILROAD COMPANY,
Petitioner,

vs.

SARASOTA-FRUITVILLE DRAINAGE DISTRICT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The order of the District Court is quoted in the appendix to the petition (Pet. App. B-1). The initial opinion of the Court of Appeals (Pet. App. B-2) is reported in 251 F.2d 583. The opinion of the Court of Appeals on rehearing (Pet. App. B-17) is reported in 255 F.2d 622.

JURISDICTION.

The initial judgment of the Court of Appeals was entered on January 14, 1958 (Pet. App. B-16). The judgment of the Court of Appeals on rehearing was entered on May 15, 1958 (Pet. App. B-26), and the petition for a writ of certiorari was filed on August 11, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED.

Florida Statutes, Section 298.22 and Section 298.62 are set forth in the Appendix, *infra*, pp. 30-31.

QUESTIONS PRESENTED.

1. Whether the decision of the Court of Appeals is unconstitutional because of an erroneous determination of the function of a Federal Court to ascertain the law of the case in the exercise of diversity of citizenship jurisdiction.

2. Whether the Court of Appeals in a case based on the diversity of citizenship jurisdiction correctly exercised its function in determining the law.

3. Whether the Court of Appeals erred in determining that a drainage district in the State of Florida was without power to enter into an indemnity agreement in consideration for a mere license.

STATEMENT OF THE CASE.

Petitioner brought suit against the Respondent in the United States District Court for the Southern District of Florida, Tampa Division, for damage to Petitioner's property. Petitioner's claim was based on certain alleged tor-

tious acts of the Respondent and an indemnity agreement entered into in 1925 by the Respondent and Petitioner's predecessor in interest (R. 25). Under the terms of the indemnity agreement, the Respondent was given the right to lay culverts under the tracks of the Petitioner. The indemnity agreement provided that this right could be terminated by the railroad at any time upon 30 days notice (R. 9). The consideration for this license was the payment of $5.00 (R. 6) and the performance by the "licensee" of his covenants, among which was the indemnification of the railroad from all loss, damage, cost and expense which the railroad might sustain growing out of the installation, presence, operation, maintenance or removal of the culverts. The indemnity agreement was not the sole consideration received by Petitioner as Petitioner states in his petition (Pet. 3), nor is there any evidence or allegation that the $5.00 was mere "nominal" consideration. The indemnity agreement was not signed by the Respondent's President nor its Vice President; but was instead signed by two of the three members of the Board of Supervisors, even though places were provided for the signatures of all three superivsors (R. 21).

Respondent is a drainage district organized under the General Drainage Law of the State of Florida, Florida Statutes, Chapter 298.

On January 19, 1957, the District Court granted the Respondent's Motion to Dismiss on the grounds that, the Respondent being a drainage district organized and existing under the General Drainage Law of the State of Florida, it had no authority to bind itself as an indemnitor and could not be held liable in tort (Pet. App. B-1).

Petitioner appealed and the United States Court of Appeals for the Fifth Circuit, with a Judge dissenting, re-

versed the District Court in an Opinion rendered January 14, 1958. On petition for rehearing, the Court of Appeals in a decision rendered May 15, 1958, set aside its former opinion and confirmed the judgment of the District Court on the basis that a drainage district under the law of the State of Florida could not by contract assume a liability with which the courts and the Legislature of the State of Florida had intended that it not be burdened and the supervisors could not negate this policy by merely contracting to do so.

Respondent feels that there are sufficient authorities in the decisions of the Florida Supreme Court to determine the issues in this case.

ARGUMENT.

1. Petitioner's argument concerning an erroneous determination of the function of a federal court to ascertain state law is an attempt on its part to knock down a straw man of its own making. Petitioner purports to make a metaphysical analysis of the court's method of arriving at its decision and then place a label of "erroneous" on his self-manufactured interpretation of what the court's unspoken reasoning was. This is pure supposition and speculation. The court did not state, and it is not apparent from its opinion, which of the various methods discussed in the petition it used in reaching its decision or that it relied on any one method to the exclusion of other methods. What is apparent, however, is that the court considered all of the applicable Florida law relating to drainage districts, the law of Florida concerning an agreement of a governmental body to do an act which it was not authorized to do, and the overwhelming weight of authority in other jurisdic-

tions as to the right of a body politic to make an indemnity agreement (Pet. App. B-19-21).

2. Petitioner appears to be in doubt itself as to how the federal courts should go about determining state law "in the absence of precise state law determining the question in issue." First, it states that the federal court has an "uninhibited mandate to determine this case as an independent tribunal" (Pet. 7.)[1]. Next, it states that the federal court "should refuse to derive new state law by a process of inference from general principles of the law of the state in the same field." (Pet. 8).[2] Finally, it says that clearly the federal courts should decide the question of state law "as if they were sitting as judges of the states' highest court" (Pet. 9, n. 10).

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1. No authority is given for this statement. Furthermore, this statement is in conflict with the holding in this Court in *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, that:

> "* * * the federal court enforcing a state-created right in a diversity case is, as we said in Guaranty Trust Co. v. York, 326 U.S. 99, 108, 89 L. Ed. 2079, 2086, 65 S. Ct. 1464, 160 A.L.R. 1231, in substance 'only another court of the State.'" [p. 203].

2. As authority for this statement Petitioner cites *Bernhardt v. Polygraphic Co., supra.* No basis, however, for this statement is to be found in the majority opinion; but only in the concurring opinion of Mr. Justice Frankfurter, which on this point was not concurred in by any other Justice. Even this concurring opinion does not go as far as Petitioner's statement but only indicates the state law. The concurring opinion follows the general rule and indicates that a ruling of the Court of Appeals on state law should not be disturbed by this Court. The majority opinion is contrary to Petitioner's statement and even went so far as to refuse to give the Court of Appeals an opportunity to review the District Court's decision as to what was the law of Vermont. As stated by the majority of the Court speaking through Mr. Justice Douglas:

> "Since the federal judge making those findings is from the Vermont bar, we give special weight to his statement of what the Vermont law is." [p. 204].

Petitioner then attempts to set up by conjecture a conflict between the various United States Courts of Appeals as to the exact method of judicial cerebration in the absence of a pronouncement on the very question in issue by the state court. Petitioner then cites five cases which it claims support its view that such confusion exists.[3] None of these cases (with the possible exception of *Fisher* v. *American National Co.*, 241 F.2d 175, 177[4]) attempts to lay down any ruling as to the method of arriving at a decision in such cases. All the courts did were to place on record some indication of the method they used in those particular cases. In three of these cases it was apparently conceded by all parties that there was an absence of state law,[5] not necessarily an absence of state law on the *exact* factual situation before the court, but an absence of *relevant* state law.

As a justification for this Court invoking its jurisdiction on certiorari, Petitioner seeks to have the Court lay down a hard and fast rule as to just how the district courts

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3. *Marshessault* v. *National Grange Mutual Liability Co.*, 229 F. 2d 698 (C.A. 2d); *Herrick* v. *Sayler*, 245 F.2d 171 (C.A. 7th); *Western Spring Co.* v. *Andrews*, 229 F.2d 413 (C.A. 10th); *Standard Accident Ins. Co.* v. *New Amsterdam Cas. Co.*, 249 F.2d 847 (C.A. 7th); and *Fisher* v. *National Ins. Co.*, 241 F.2d 175 (C.A. 3rd).

4. "The Pennsylvania courts have never passed upon the precise clause involved in the instant case. That being so we are required to consider such approach to the problem as may be indicated by the Pennsylvania cases in the general field and to resort to general applicable principles to reach a decision consistent with Pennsylvania law. Continental Assurance Co. v. Conroy, 3 Cir. 1954, 209 F.2d 539; Aetna Casualty & Surety Co. v. DeMaison, 3 Cir., 1954, 213 F.2d 826."

5. *Marshessault* v. *National Grange Mutual Liability Co.*, *supra*; *Standard Accident Ins. Co.* v. *New Amsterdam Cas. Co.*, *supra*; *Western Spring Service Co.* v. *Andrews*, *supra*.

and the courts of appeals shall go about arriving at state law. This is so, even though Petitioner admits and approves of the fact that there is considerable flexibility as to such methods.[6] The subject of federal courts determining state law is not one which admits of roughshod dogmatic restrictions, but one which should be handled with considerable delicacy with consideration given to all factors. No rule could be laid down by this Court as to the method of judicial cerebration which would not promote and increase conflict between state and federal court decisions on state law. This, of course, is what this Court's decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, was supposed to prevent.[7] Since the various state courts have not unanimously adopted any regimen of judicial thought processes in arriving at state law in the absence of a state decision on the precise point, this Court could not lay down such a uniform procedure for the lower federal courts to follow in each of their various jurisdictions.

Court of Appeals Should Not Be Reversed on State Law.

Petitioner apparently has overlooked a clear policy of this Court which has already been established in regard to the determination of state law. This Court has quite properly exercised the utmost reluctance to pit its judgment as to state law against those of the lower federal courts. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667; *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S.

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6. Petitioner's Brief, p. 8, n. 8.

7. "The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a nonresident litigant in a federal court instead of in a state court a block away should not lead to a substantially different result." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109. Quoted with approval in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 204.

530; *Propper* v. *Clark*, 337 U.S. 472; *Spiegel's Estate* v. *Commissioner of Internal Revenue*, 335 U.S. 701; *Steel* v. *General Mills*, 329 U.S. 433; *Hillsborough Township* v. *Cromwell*, 326 U.S. 620; *Helvering* v. *Stuart*, 317 U.S. 154; *MacGregor* v. *State Mut. Assur. Co.*, 315 U.S. 280; *Compania General De Tabacos* v. *Collector of Internal Revenue*, 279 U.S. 306. This is particularly so where the state law on the precise point is not clear, or when the opinion of the Court of Appeals is in agreement with that of the District Court.[8] As held by the Court in *MacGregor* v. *State Mut. Life Assur. Co.*, *supra*:

> "No decision of the Supreme Court of Michigan, or of any other court of that State, construing the relevant Michigan law has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan." [p. 281].

Petitioner's right to a reversal in this Court is specifically negated by the Court's holding in *Helvering* v. *Stuart*, *supra*, and *Spiegel's Estate* v. *Commissioner*, *supra*: In the first of these cases it was stated concerning the view of the Court of Appeals:

> "This conclusion does not spring from a statute of that state nor even from a clear or satisfying line of decisions. It is, however, the reasoned judgment

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8. As shown in the report of a companion case to the case at bar, *Seaboard Airline Railroad Co.* v. *Sarasota-Fruitville Drainage District*, 255 F.2d 626, the same question of state law was presented to another United States District Judge; and he too made the same ruling as to the Florida law. The trial judges in the two cases have a combined experience of over three score years and ten on both state and federal benches in an area where drainage districts are perhaps more numerous and widespread than any place in the world.

> of the circuit which includes Illinois in which a judge of long experience in the jurisprudence of that state participated. Without a definite conviction of error in the conclusion, this Court will not reverse that judgment." [p. 163].

In the latter Mr. Justice Black, speaking for the majority of the Court, held:

> "It would be wholly unprofitable for us to analyze Illinois cases on the point here urged. It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general policy and leave undisturbed this Court of Appeals holding on a question of State law." [p. 708].

In *Propper* v. *Clark*, 337 U.S. 472, the very method was used by the Second Circuit which the Petitioner asserts, with criticism, was used by the Court of Appeals in the case at bar. In that case there was no holding of the New York courts on the "precise issue of state law involved," and the Court of Appeals turned to state cases in *analogous* situations. In affirming the Court of Appeals' decision, Mr. Justice Reed, speaking for a majority of the Court, stated:

> "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." [p. 486].

In probably the most recent pronouncement of the Court on this subject, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, *supra*, the majority of the Court speaking through Mr. Justice Frankfurter made the unequivocal statement that:

"* * * we do not reexamine the local law as applied by the lower courts." [p. 674].

Court of Appeals in Accord with State Law.

3. Regardless of which metaphysical method Petitioner believes to be the proper one, the opinion and decision of the Court of Appeals would meet its requirements. There is also little question that the Supreme Court of the State of Florida would have held exactly as did the District Court and the Court of Appeals. The Legislature and the Supreme Court of Florida have given drainage districts in that state a favored place in the law, even to the extent of allowing such drainage districts to tax the lands of the state itself.[9] Certainly the same Court which handed down the decision of *Rabin* v. *Lake Worth Drainage District*, Fla., 82 So. 2d 353, in September of 1955 (which held that a drainage district could not be compelled to respond in damages for a tort or forced to levy taxes for this purpose because the power of taxation of the district was limited strictly to the improvement and maintenance of the district and could not be exercised for any other purpose)[10] would have felt bound to hold that the Florida Legislature did not contemplate that such a district could be compelled to respond in damages resulting from a tort, just because two supervisors by contract agreed that

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9. *State* v. *Warren*, Fla., 57 So.2d 337; *State* v. *Caldwell*, 160 Fla. 355, 35 So.2d 642; *State* v. *Everglades Drainage District*, 155 Fla. 403, 20 So.2d 397; *State* v. *Lake Worth Drainage District*, 155 Fla. 408, 20 So.2d 399.

10. The policy of the State of Florida that its drainage districts should not be compelled to expend their tax monies in compensation for personal injuries or property damages, is based not only on the doctrine of sovereign immunity but on the limited and special character of a drainage district which is inherent in its creation.

the district could be so compelled. The Florida Court would have felt constrained to look to its previous decisions concerning the powers of the state's various political subdivisions and agencies,[11] particularly those of drainage districts,[12] in the absence of express statutory authority. It would have considered the special nature of a drainage district, its limited and definite purpose, limited authority and

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11. *Molwin Investment Co.* v. *Turner*, 123 Fla. 505, 167 So. 33; *White* v. *Crandon*, 116 Fla. 162, 156 So. 303; *Williams* v. *Town of Dunnellon*, 125 Fla. 114, 169 So. 631; *Hopkins* v. *Special Road & Bridge District No. 4*, 73 Fla. 247, 74 So. 310; *First National Bank of Jacksonville* v. *Duval County*, 45 Fla. 496, 34 So. 894.

12. *Halifax Drainage District of Volusia County* v. *State*, 134 Fla. 471, 185 So. 123; *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District*, 77 Fla. 742, 82 So. 346; *State ex rel. Davis* v. *Jumper Creek Drainage District*, 153 Fla. 451, 14 So.2d 900.

As stated in *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District, supra*:

> "A careful examination of the acts of the Legislature does not reveal any *express* power or authority granted the defendant in error to levy a toll upon boats passing through the lock in question. In much detail have the various powers been set out. The careful enumeration of these powers is an indication that this board was not to have any others than those enumerated. 'Expressio unius est exclusio alterius.'" [Emphasis supplied] [p. 351].

In *State ex rel. Davis* v. *Jumper Creek Drainage District, supra*, it was held that the district had no power to discharge a particular landowner's property from further taxation in consideration of full payment of the *total* tax assessed against it, so as to prevent further assessments (not, of course, in excess of the assessed benefit). Referring to the General Drainage Law, the court stated:

> "* * * The creative statute is a grant of power and the supervisors of the district must look *entirely* to the statute for their authority. All persons and their privies dealing with the supervisors are charged with notice of the limitation of authority vested in the officials." [Emphasis supplied].

limited power of taxation.[13] It would have considered the right Respondent obtained under the indemnity agreement in the light of the distinguishment it made between a "license" and an "easement" in *Burdine* v. *Sewell*, 92 Fla. 375, 109 So. 648, and measured it against the types of interests in land which the Respondent's supervisors were authorized to acquire.[14] Finally, the Florida Court would look at Petitioner's argument that an unauthorized act or a prohibited result can be compelled through the medium of a contract, against its decisions in *State ex rel. Davis* v. *Jumper Creek Drainage District*, 153 Fla. 451, 14 So. 2d 900[15]; *First National Bank of Jacksonville* v. *Duval County*, Fla. 633, 149 So. 203.

45 Fla. 496, 34 So. 894;[16] *Brumby* v. *City of Clearwater*, 108

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13. *Halifax Drainage District of Volusia County* v. *State*, *supra*; *State ex rel. Root* v. *Crandon*, 115 Fla. 153, 155 So. 667; *Hardee* v. *State*, 83 Fla. 544, 91 So. 909; *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District*, *supra*; *Arundel Corp.* v. *Griffin*, 89 Fla. 128, 103 So. 422; 11 Fla. Jur., *Drainage and Drainage Districts*, Sec. 9.

14. Fla. Stat., §§ 298.22, 298.62.

15. See note 12, *supra*.

16. There the defendant county was without sufficient funds to pay its warrants. In order to have its warrants honored it was agreed between the county and the bank that if the bank would cash the warrants, the county would repay it with interest. The bank cashed the warrants, but when the time came for it to be repaid the county refused to pay the interest as agreed. The Florida Supreme Court sustained the county and based its decision upon the fact that the statutes gave the county no authority to pay interest on county warrants, and in effect held the contractual feature of the case immaterial, *i. e.*, if the county could do it by contract, authority had to be found for the county to do the same act *in the absence of any contract*. The Florida court dismissed the argument concerning the agreement with the following statement:

> "To permit the county commissioners to evade the requirements of these sections, by sanctioning the contract

Petitioner constantly refers to the absence of state law on the point in issue. Respondent strenuously takes issue with this premise and for this reason has left this phrase out of questions 1 and 2 under the heading of "Questions Presented" in this brief. It is true that the Florida court has never ruled on the exact self-same factual situation at bar, but on appeal it is rare to find a case which precisely coincides with the facts then before the Court. There is, however, ample state law which, when properly and logically applied to the facts herein, will produce the same decision that the District Court and the Court of Appeals reached. It is not necessary to make "new" Florida law, but merely to logically apply old recognized principles of Florida law to a new set of factual details.

Since the General Drainage Law of the State of Florida (the organic act of the Respondent) did not give Respondent the power to acquire mere licenses in land nor to execute indemnity agreements, all that was necessary was the application of the Florida law that the supervisors of drainage districts must look *entirely* to the statute for their authority[17] and the careful enumeration of the super-

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declared upon in this case, would be to enable them to fix upon the county the burdens of a refunding of the county indebtedness at a rate of interest to be fixed by themselves, without imposing upon them the duty of submitting to the people at an election the question of the propriety of funding the indebtedness, and the rate of interest to be paid thereon. While the contract made with plaintiff may have been wise from a business point of view, tending as it did, to sustain the credit of the county, we have been unable to find a statute granting the power to make it, or granting any other power from which we can clearly imply the one here attempted to be exercised." [p. 895].

17. *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District, supra;* and *State ex rel. Davis* v. *Jumper Creek Drainage District, supra.*

visors' powers in the statute amounts to a prohibition of

any other powers.[18] Since the ultimate result of Petitioner's action would be to require Respondent to tax its landowners a sum in excess of $28,000.00 for property damage incurred by another as the result of one of its employee's negligence without any corresponding or equal benefit, all that would be necessary would be to invoke the doctrine of the Florida court and the Florida Legislature that drainage districts shall not be forced to respond in damages for the negligence of their employees and their landowners cannot be taxed except when directly tied into a benefit to the land.[19] Since it is admitted by all concerned that the Respondent could not be held accountable for its torts (*a fortiori*, the torts of others or Acts of God), nothing more was necessary than to look to the Florida decisions that a Florida governmental body's authority to do an act or its

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18. *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District, supra.*

19. *Arundel Corp.* v. *Griffin*, 89 Fla. 128, 103 So. 422; and *Rabin* v. *Lake Worth Drainage District*, Fla., 82 So.2d 353. As the Florida court stated in the *Rabin* case:

> "Another allied question is inherent in this record, that is the practical problem of collecting. If the appellant were held to have the constitutional right to proceed and he obtained a judgment, how would he go about collecting it? The district has the power only to assess against lands within its boundaries assessments to accomplish an over-all drainage operation to make the lands within the whole area cultivatable and keep them so. The assessments for main and subsidiary canals are made against the individual parcels of lands according to the benefit each parcel will receive from the project as a whole. Hearings are conducted so that any property owner aggrieved by the assessment may be heard. The financing of the improvement is based on the total assessment, the obligation undertaken to construct the project is discharged from the assessments paid. How could the district be coerced to pay any judgment obtained in a tort action except on the theory that by the commission of the tort the lands in the district were benefited? Campbell v. State ex rel. Garrett, 133 Fla. 638, 183 So. 340. This is so nebulous as not to warrant further exploration." [p. 355].

responsibility, pursuant to a contract, would be the same as if there was no contract.[20]

Petitioner does not attempt to deny any of these principles nor even to evade them. Instead it relies on what it terms an "established trend of Florida law" regarding the doctrine of sovereign immunity. Although the immunity of a drainage district is based on the very practical fact that no tax can be levied to pay for property damage or personal injury[21] as well as on the historical doctrine of sovereign immunity; we will momentarily comment on these cases. Instead of these cases reflecting a new "trend" of the Florida court, they actually amount to very little except a return to the practical result of the holding in the first case listed in the so-called "trend,"[22] a case 35 years old. It is also to be noted that, with the exception of two cases decided in 1941, all of these cases are ones involving cities, which have an entirely different rule involving immunity and which is not based purely on the doctrine of sovereign immunity.

In regard to the two cases decided in 1941, to wit: *State Road Department* v. *Tharpe*, 146 Fla. 754, 1 So.2d 868 and *State Road Department* v. *Bender*, 147 Fla. 15,

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20. *State ex rel. Davis* v. *Jumper Creek Drainage District, supra; First National Bank of Jacksonville* v. *Duval County, supra; Brumby* v. *City of Clearwater, supra.*

21. *Arundel Corp.* v. *Griffin, supra*, and *Rabin* v. *Lake Worth Drainage District, supra.*

22. In 1923 the Florida court held that the operation of a fire truck was not a governmental function of the city of Tallahassee in order to allow recovery against the city, *Kaufman* v. *City of Tallahassee*, 84 Fla. 634, 94 So. 697. It is submitted that the practical effect of the Florida court's holding in the last case of this so-called "trend", *Hargrove* v. *Town of Cocoa Beach*, Fla., 96 So.2d 130, was but a very short march down the road of municipal liability from the *Kaufman* case (if at all).

2 So.2d 298; both of these cases were before the Florida court when it rendered its clear decision on the immunity of drainage districts in the case of *Rabin* v. *Lake Worth Drainage District, supra.* The Florida court, however, rejected, *as applied to drainage districts,* the theory of the basis of the recovery against the State Road Department in those cases, to wit: Recovery for the unlawful taking of property without compensation.

If Petitioner attempts to set out the nine cases listed on p. 10 of his Brief as representing a "trend" which included drainage districts organized under the General Drainage Law of the State of Florida, then it will also have to admit that this "trend" was truncated in September of 1955 when the Florida court handed down its opinion in *Rabin* v. *Lake Worth Drainage District, supra,* which clearly and without equivocation sets out the immunity of such drainage districts. The case of *Hargrove* v. *Town of Cocoa Beach, supra,* would have no effect on the decision in the *Rabin* case, since the court was there quite careful to limit its holding to municipal corporations. There was no question there as to the necessity that the city's tax be directly tied into a benefit to the land as is the case with a drainage district.

Hohensee Case.

The only other authority on which Petitioner relies is the case of *H. Hohensee Construction Co.* v. *Chicago, M., St. P. & P. Ry. Co.,* 218 Wis. 390, 261 N.W. 242. Petitioner's phraseology in regard to the holding in this case would lead one to believe that it involved the "power of a drainage district" and concerned "drainage district law." There was no question at all concerning drainage districts or drainage district law in the *Hohensee* case, and we are certain that Petitioner did not intend to so imply. The

Hohensee case concerns a city, the city of Milwaukee, and not a governmental body of such circumscribed authority as a drainage district. In addition, the city of Milwaukee, as was pointed out by the Wisconsin court, had "power to act for its *commercial* benefit" and could "contract for the doing of public work." Certainly, Respondent was given no such broad powers under the General Drainage Law. A city has general powers of government, it has general powers of taxation, and its creating acts usually contain such omnibus clauses as "police power," "general welfare" and similar clauses. This is not so with a drainage district. The powers of a drainage district have been very meticulously set out, and the careful enumeration of those powers precludes any others.[23]

Petitioner (Pet. 11, n. 12) alleges that the later case of *Pohland* v. *City of Sheboygan*, 251 Wis. 20, 27 N.W. 2d 736, supports the *Hohensee* case. The opposite, however, is true; since the *Hohensee* case was so brusquely treated in the *Pohland* case as to cause considerable doubt whether it has any effect at all, even in Wisconsin.

The issue in the *Pohland* case, which was decided 12 years after the *Hohensee* case, was the same as that in the case at bar—whether or not the immunity from tort liability could be waived by contract. The city there was operating a recreation park and had taken out a liability insurance policy covering the operation of the park. There was a statute authorizing the city to take out such a policy to protect the city, its officers and its employees from liability. Apparently the policy contained an express agreement that neither the insurance company nor the city would assert the city's immunity to suits for its neg-

23. *Forbes Pioneer Boat Line* v. *Board of Commissioners of Everglades Drainage District, supra.*

ligence. The Plaintiff was injured at the park through the alleged negligence of the city and brought suit against the city and the insurer. Both demurred on the grounds of the city's immunity and both demurrers were sustained. Strangely enough, the lower court relied on the *Hohensee* case in making its decision. Although the opinion in the *Hohensee* case clearly gives two situations where a city may enter an indemnity contract: First, when such an agreement is necessary to its protection; and second, when such an agreement is to its advantage in connection with any contract that it has express power to make; the lower court cited the case for the proposition that the city had *no* right to make such a contract *unless necessary for its protection.* In doing so the lower court completely ignored the second of the two situations, but the Supreme Court of Wisconsin apparently approved this holding.[24] Even though cities have much broader powers than drainage districts,[25] and even though those powers are more liberally construed,[26] the Wisconsin court held, in regard

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24. As stated by the Wisconsin court:

"The Circuit Court ruled that the city had *no right* to make an indemnity contract *unless necessary* for its protection, citing *Hohensee Construction Co.* v. *Chicago, Milwaukee, St. P. & P. Ry. Co.*, 218 Wis. 390, 261 N.W. 242, which he says by an implication so holds. While that case only holds that a City may make an indemnity contract when for its benefit or advantage, we think *his* holding is correct. No statutory city power is pointed out, no adjudicated cases are pointed out, as authority in support of the theory that the city can make an indemnity contract except so far as is *necessary* for its own protection. * * * But *we perceive no authority for making a contract to indemnify any one but the city or its employees when the latter is authorized by statute.*" [Emphasis supplied].

25. *Tri-City Fresh Water Supply District No. 2 of Harris County* v. *Mann*, 135 Tex. 280, 142 S.W.2d 945.

26. *White* v. *Crandon*, 116 Fla. 162, 156 So. 303; *Williams* v. *Town of Dunnellon*, 125 Fla. 114, 169 So. 631; *Hopkins* v. *Special Road & Bridge District No. 4*, 73 Fla. 247, 74 So. 310; *Tax Factors*

to plaintiff's contention that the city and insurance company were estopped to assert immunity because of the agreement:

> "As to the City, the City has no power except such as is conferred on it by statute, and such as is *necessary* to the exercise of a power so conferred. No statute is pointed out as conferring the power to make the agreement referred to, and none is pointed out from which the power to make that agreement is *necessary*. We know of no statute conferring or authorizing the exercise of such power. No adjudicated cases are cited as authorizing such power. We consider that the proposition contended for is not tenable." [Emphasis supplied].

Authorities from Other Jurisdictions.

Regardless of the rule in Wisconsin, it is clear that the overwhelming weight of authority is to the effect that governmental bodies such as a drainage district have no authority, unless clearly granted by statute, to become a guarantor or an indemnitor, *Nashville* v. *Sutherland*, 92 Tenn. 335, 21 S.W. 674; *Becker* v. *Keokuk Water Works*, 79 Iowa 419; *People* v. *Dibble*, 189 N.Y.S. 29; *Vaughman* v. *Town of Waterloo*, 14 Ind. App. 649, 43 N.E. 476; *Davenport* v. *Pitt Cty. Drainage District No. 2*, 220 N.C. 237, 17 S.E.2d 1; *Wheeler* v. *Sault Ste. Marie*, 116 Mich. 338, 129 N.W. 685; *American Malleables* v. *Town of Bloomfield*, N. J., 81 Atl. 500, Aff. 85 Atl. 167.

One of the leading cases on this point is *Nashville* v. *Sutherland*, *supra*. The facts in that case are very similar to those which are now before us, except that the City of Nashville was liable for its negligence whereas Respond-

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v. *Marin County*, 20 Cal. App. 2d 79, 66 P.2d 666; *Lancaster* v. *Atchison County*, 352 Mo. 1039, 180 S.W.2d 706.

ent is not. There the plaintiff, as did the Petitioner here, conveyed to the City of Nashville a right-of-way to lay a pipe for drainage purposes through their lumber yard to the river. As part of the consideration for this right the city agreed to place on the pipe a suitable value so as to prevent, in case of a high rise in the river, the flowing of water from the river back through the pipe into the premises of plaintiff. The pipe was laid and the valve constructed. Subsequently a rise in the river caused an overflow through the valve in the pipe and submerged the property of the plaintiff. Judgment was recovered against the City in the lower court. In reversing the lower court's decision, the Supreme Court of Tennessee stated:

> "It was within the power of the officers of the City to agree to put in any kind of sewer and valve (had they done so) as part consideration for the grant of right-of-way; but they could not, in the absence of charter power, bind the City by a guaranty[27] that they or it would put in such pipe or valve as would prevent overflow, to the injury or damage of owners, and thus make the City insurors of property against such injury. The City is only liable for absence of reasonable care and skill in the execution of such work, and its officers *cannot lawfully contract to bind it beyond this, without express charter power*, not claimed or shown in this record to exist."
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> "The board of public works and affairs *could bind the city by contract so far, and no farther than it would have been bound by law;* that is, to ordinary skill and care in the execution of the work agreed to be done. So, as is well said in the same argument of counsel: 'If they had undertaken to indemnify Sutherland & Co. against loss resulting from defendant's

27. Actually the agreement amounted to an indemnification rather than a guaranty.

negligence in the execution of the work, this would have been valid. For this much the city is bound by law, independent of any contract provision. But, instead of limiting the city's obligation as fixed by law, the Board, by contract, attempted to make it liable for what, in the absence of such a contract, it is not pretended it could have been liable. The inhabitants of the City of Nashville—those people who live within the corporate limits—are its corporators. *Their liability, as well as their rights, are fixed by law; and no more can the agents of these corporators increase their liabilities than they can deprive them of their rights.* The Legislature of the state has deemed it wise policy to charge municipal corporations with a certain liability. All who deal with these corporations are bound to know the extent of this liability, and, when the corporation's agents exceed it, *they may be guilty* of a personal wrong, but cannot subject the corporation they represent to damages on that account.'" [Emphasis supplied].

A somewhat similar type of contract, this time of a drainage district, was held invalid in *Davenport* v. *Pitt County Drainage District No. 2, supra*, but through a different approach.

In *Vaughtman* v. *Town of Waterloo, supra*, it was held that a town did not have authority to indemnify even its own marshal for enforcing one of its own ordinances. There the Town of Waterloo passed an ordinance which made it a misdemeanor for a person to carry passengers in a vehicle for hire without a license. The ordinance also made it the duty of the town marshal to arrest all persons violating the ordinance. One Crayens violated the ordinance. Before making the arrest, however, the marshal reported to the town's board of trustees that Crayens stated he would resist the enforcement of the ordinance. Thereupon, the town by its board of trustees, duly promised and

agreed with the marshal that, if he would make the arrest, the town would prosecute the person, would save the marshal harmless, would pay him all cost, trouble and expense which he might be put to by reason of the commencing of the actions, and that if Crayens sued him for making the arrest that the town would defend him and pay all cost and damages which he might incur in said arrest. Relying on such agreement the marshal made the arrest, but the town failed to defend him as it promised. The Indiana Court, nevertheless, held that the town had no power to enter into such an agreement and pointed out that a town's power is only such as is *expressly* granted by the law under which it is created.

In *American Malleables* v. *Town of Bloomfield, supra,* the Town of Bloomfield entered into a contract with a railroad whereby the railroad agreed to elevate its tracks. The contract called for the city to vacate a certain street and for the preservation of an industrial siding on plaintiff's land at the same elevation. The plaintiff with this understanding permitted the railroad to build a depot on its (the plaintiff's) land in furtherance of the contract, made no objections to the vacating of the street abutting its land, and permitted the removal of the existing siding. The town and the railroad subsequently modified the contract so as to omit the industrial siding which was to be on the plaintiff's property. Before agreeing to this the railroad had the town agree in the amended contract to indemnify it and save it harmless from all claims, demands, etc., of the plaintiff by virtue of the elimination of the industrial siding. It was held that the town had no power to enter into such a contract.

The argument that an unauthorized means may be used to obtain an authorized end was presented and re-

jected in the case of *Lynchburg and R. St. Ry. Co.* v. *Dameron, supra,* and *Wheeler* v. *City of Sault Ste. Marie, supra.*

The City of Lynchburg in *Lynchburg and R. St. Ry. Co.* v. *Dameron* was expressly authorized to rent, purchase, lease "or otherwise acquire" suitable works, machinery, etc., for the generation of electricity for the use of the city and its inhabitants. To accomplish this end the city entered into a contract with the railroad under which the railroad was to furnish electric lights for the city. In order to render the services contracted for, the railroad would have to erect a new power station, which required financing by the issuance of bonds. As part of the agreement the city agreed to guarantee the payment of the bonds in order to facilitate their sale. The question involved was whether the city had the authority to make such guarantee.

The railroad argued that since the city was expressly authorized to acquire works, machinery, etc., for the generation of electricity for itself and its inhabitants, that therefore, the city had the implied or incidental power to secure the same results indirectly by aiding the railroad in so doing; instead of expending money for that purpose it could lend the credit of the city to the railroad, especially where it took security to protect it from loss. The court stated:

> "The general rule is that the officers or governing body in a corporation, whether public or private, have no implied power to bind it as the surety, indorser, or guarantor for another in a business in which it has no interest. Such a transaction is not within the scope of its business.
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> "* * * The investment or expenditure of money, and the loaning of the credit of the principal, under the rule of mandate, are not governed by the same

rule. The open and direct appropriation and expenditure of money by the officers of a municipal corporation *has nothing in common with the contingent and long-continuing contract of suretyship.*

"It is clear, upon principle, that a municipal corporation, which has authority to expend corporate funds in doing a particular act, cannot lend its credit to another, to enable it to do the same act, without legislative authority. * * *" [Emphasis supplied].

In *Wheeler* v. *City of Sault Ste. Marie*, 164 Mich. 338, 129 N.W. 685, an indemnity agreement similar to the one at bar was in question. There the city desired to widen a street upon which the plaintiff's property fronted. In consideration of his conveyance of a strip of his land for this purpose the city agreed to move back the plaintiff's store building a distance of ten to twelve feet and place the same in the new location in as good a condition as before. Also the city agreed to save the plaintiff harmless and assumed all risk in moving the building both as to persons and property. The plaintiff attempted to get specific performance of the agreement, but the city defended on the grounds that it had no authority to make such a contract. Holding the city had no authority to enter into such a contract, the court said:

"* * * *The contract cannot be sustained on the ground that it is for the purpose of acquiring property for the public use.* The city undoubtedly has a right to acquire the strip of land which complainant agreed to convey, but when it decides to do so, it must resort to some of the modes of acquisition pointed out by the statute or its charter. *To acquire the property in question, it is unnecessary to enter into such a contract. It can be purchased by agreement or condemned and a money consideration paid for it. It has not the power to acquire property for the public use*

by entering into contracts of this character. Penley et al. v. City of Auburn, 85 Me. 278, 27 Atl. 158, 21 L.R.A. 657; *Stewart v. City of Council Bluffs*, 50 Iowa 668.

"Another equally cogent reason suggests itself why the city could not legally enter into the proposed contract. By accepting the terms of the contract, it would undertake to carry a casualty risk during the time the building was being moved, and might subject the city to a great loss in the event that the building should collapse. It would likewise compel the city to carry a personal indemnity risk for the employees while engaged in the work. The carrying of casualty and indemnity risks for individuals or other corporations is clearly beyond the power of the defendant city. *Nashville v. Sutherland & Co.*, 92 Tenn. 335, 21 S.W. 674, 19 L.R.A. 619, 36 Am. St. Rep. 88; *Carter v. City of Dubuque*, 35 Iowa 416; *Blake et al. v. City of Macon*, 53 Ga. 172.

"The proposed contract was *ultra vires*, and the trial court was right in refusing to enforce it." [Emphasis supplied].

Not only did the Court of Appeals examine and correctly apply all the applicable Florida law to the case at bar, but it looked to the law of other jurisdictions as suggested by Petitioner and correctly found that its conclusion was "in accord with the weight of authority in other jurisdictions." (Pet. App. B-21).

The contract which Petitioner attempts to enforce here illustrates the reasons for the necessity of the rules that the officers of drainage districts have only such powers as are granted to them by statute and that governmental bodies cannot execute indemnity agreements. The contract here was nothing more than a gamble on the part of the supervisors. It was a gamble with unlimited stakes

as far as the drainage district was concerned. There could have been such an accident[28] that, if the contract was enforced, it could have bankrupted the district. In exchange for this long continuing contingent liability of unlimited amount, covering not only the district's negligence, but the railroad's negligence and anyone else's negligence, as well as Acts of God; the district received, as a matter of *right*, *only a 30-day* privilege to cross Petitioner's tracks. The indemnity agreement specifically provided that this privilege could be cancelled *by the railroad* at any time merely by giving 30 days notice (R. 9). It would be unconscionable to allow two supervisors to risk so much for so little. If an easement could not have been purchased, it could have been condemned for a small sum. Certainly the cost would not have been enough to warrant the landowners' property being placed in jeopardy.

No authority is given for a drainage district to acquire a mere "license" in any of the powers granted a drainage district; and, as the Florida Supreme Court held in *Forbes Pioneer Boat Line* v. *Board of Commissioners Everglades Drainage District*, 77 Fla. 742, 82 So. 346, the particularity with which these powers are set out shows that the Legislature intended the supervisors to have no others. This was not a mere oversight on the part of the legislative draftsmen. Drainage districts are created to exist for long periods of time, usually for perpetuity. The needs for right-of-ways are not temporary needs. What good would it be for a drainage district to acquire a mere "license" over a party's land? Usually many miles of ditches are dug, both upstream and downstream from a particular person's property. To merely have a "license" to carry

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28. The indemnity agreement does not have any liability limit.

water through a person's property for only as long as he is agreeable; would be worse and would cause more trouble, than not having any right at all. What would happen when the person decides to change his mind and terminate the "license"? What would happen here if the railroad exercised its 30 day cancellation clause? What if this election was exercised at the beginning of the traditional rainy season in southern Florida? A new ditch could not be dug within 30 days nor could condemnation proceedings be completed. Not only by applying the rules of statutory construction, but by applying the rules of common sense, this was not the type of interest that a drainage district was authorized to acquire, regardless of the method of acquisition and regardless of the type or nature of the consideration given.

The promise made by Respondent in the present case in consideration for the "license" not only was unauthorized and *ultra vires*, but it was "*unlawful.*" It is admitted that the Respondent is not to be liable under the Law of the State of Florida for its negligence. Since it cannot be liable for its own negligence, it must also be admitted that it could not be liable for someone else's negligence. *A fortiori*, it must be admitted it could not be held liable for an unavoidable accident or an Act of God. Admitting this, any attempt on the part of two supervisors of the drainage district to make it liable in any of these instances must be in contravention of the law of the State of Florida, and, therefore, an unlawful act. The indemnity agreement on the part of two of the three supervisors was an attempt to waive an immunity which previously existed and an attempt to assume a liability which had not previously existed.

The fact that such an attempt was made through the mechanics of a contract does not prevent it from being

unlawful. As the Florida court held in *First National Bank of Jacksonville* v. *Duval County*, *supra*, governmental officials cannot evade the effect of the Law through the sanction of a contract. To so allow would be to place them beyond and above the Law. A contract relationship could always be obtained as a guise to cover the unauthorized assumption of authority.

The Florida Supreme Court in the cases of *Arundel Corp* v. *Griffin*, *supra*, and *Rabin* v. *Lake Worth Drainage District*, *supra*, have made it clear that it was not the form of the suit that was abhorrent, but, more important, the actual physical circumstances which gave rise to the suit —whatever its form. These cases show that the danger from which the State of Florida wishes to protect its drainage districts is not the institution of a suit plead *ex delicto* but the *payment of damages*. It was not the will of the Legislature of the State of Florida that Respondent merely be immune to a suit *ex delicto*, but that it should be protected from paying the damages arising out of injury to person or property, regardless of the nature of the suit. It is not the form of the pleadings that provides the danger, but the characteristics of a suit arising out of damage to person or property. The policy of the State of Florida in this regard is for the purpose of preventing a particular harm, and is practical, not theoretical nor technical in nature. The harm to the Respondent's landowners will be just as great whether Petitioner comes into court suing for the tort or on its contract. Since the physical facts giving rise to the suit and the effect thereof will be the same in each case, each is equally prohibited.

The immunity from being forced to respond in damages for injury to person or property is that of the landowners of the district. It is not for the benefit of the board of supervisors; and since it is not theirs, it is not theirs to

give away or waive. This is in accord with the general rule that governmental officials are not allowed to waive their constituents' immunity to being taxed to pay for property or personal injury damages, *Adams* v. *City of New Haven*, 131 Conn. 552, 41 A.2d 111; *Lambert* v. *City of New Haven*, 129 Conn. 647, 30 A.2d 923; *Nashville Trust Co.* v. *City of Nashville*, 182 Tenn. 545, 188 S.W.2d 342; *Nashville* v. *Sutherland*, 92 Tenn. 335, 21 S.W. 674.

CONCLUSION.

The only question presented in the Petition is one of state law. There is no federal or constitutional issue presented. It is not often that this Court is called upon to review a question of state law which has been so thoroughly considered by the lower federal courts. The question was argued before two District Judges, both of whom decided the question in favor of Respondent. Not only was the question considered by the Court of Appeals in two separate cases, but was also considered on petition for rehearing, with the final outcome in both cases in favor of Respondent. The holding of the Court of Appeals is in complete harmony with the decisions of the Florida Supreme Court concerning governmental bodies, particularly those decisions involving drainage districts; and is in accord with the overwhelming weight of authority in other jurisdictions.

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

CHARLES E. EARLY,
Attorney for Respondent.

APPENDIX

1. Fla. Stat., § 298.22:

"In order to effect the drainage, protection and reclamation of the land in the district subject to tax, the board of supervisors may clean out, straighten, open up, widen, or change the course and flow, alter or deepen any canal, ditch, drain, river, water-course, or natural stream; and concentrate, divert or divide the flow of water in or out of said district; construct and maintain main and lateral ditches, canals, levees, dikes, dams, sluices, revetments, reservoirs, holding basins, floodways, pumping stations and syphons, and may connect same, or any of them, with any canals, drains, ditches, levees or other works that may have been heretofore, or which may be hereafter constructed by the trustees of the internal improvement fund or the board of drainage commissioners of the state, and with any natural stream, lake or water-course in or adjacent to said district, build and construct any other works and improvements deemed necessary to preserve and maintain the works in or out of said district; acquire, construct, operate, maintain, use, sell, convey, transfer or otherwise provide for pumping stations, including pumping machinery, motive equipment, electric lines and all appurtenant or auxiliary machines, devices or equipment; contract for the purchase, construction, operation, maintenance, use, sale, conveyance and transfer of the said pumping stations, machinery, motive equipment, electric lines and appurtenant equipment, including the purchase of electric power and energy for the operation of the same; construct or enlarge, or cause to be constructed or enlarged, any and all bridges that may be needed in or out of said district, across any drain, ditch, canal, floodway, holding basin, excavation, public highway, railroad right of way, track, grade, fill

or cut; construct roadways over levees and embankments; construct any and all of said works and improvements across, through or over any public highway, railroad right of way, track, grade, fill or cut, in or out of said district; remove any fence, building or other improvements, in or out of said district; and shall have the right to hold, control and acquire by donation or purchase and if need be, condemn any land, easement, railroad right of way, sluice, reservoir, holding basin or franchise, in or out of said district, for right of way, holding basin for any of the purposes herein provided, or for material to be used in constructing and maintaining said works and improvements for drainage, protecting and reclaiming the lands in said district. Said board of supervisors also may develop, hold and control all water power created by the construction of works of said district, and may construct and maintain hydro-electric power plants for the purpose of developing such power for the use of said district, use any funds in the treasury of said district not otherwise appropriated for the construction and maintenance of such power plants; and the said board of supervisors may lease any surplus power in excess of that required for the uses of said district, and the proceeds of such leases shall be paid into the treasury of said district. Said board also may condemn or acquire, by purchase or grant, for the use of the district, any land or property within or without said district not acquired or condemned by the court on the report of the commissioners assessing benefits and damages, and shall follow the procedure set out in chapter 73."

2. Fla. Stat., § 298.62:

"Any and all drainage and sub-drainage districts created or organized under the laws of the state may acquire by gift, purchase, exchange, donation or condemnation, any lands within or without the said district for canal right of ways, or for other general purposes of the said district, and if acquired by condemnation the procedure shall be as prescribed in chapter 73."